



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91619; File No. SR-NASDAQ-2021-020]

### **Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Credits at Equity 7, Section 118(a)**

April 21, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 12, 2021, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend the Exchange's transaction credits at Equity 7, Section 118(a), as described further below.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's schedule of credits, at Equity 7, Section 118(a). Specifically, the Exchange proposes to (1) eliminate an existing credit of \$0.0030 per share for members that meet specified volume requirements on both Nasdaq and the Nasdaq Options Market ("NOM") when adding liquidity; and (2) amend an existing credit of \$0.0030 per share for members that meet specified volume requirements on Nasdaq when adding liquidity and that qualify for Tier 4 of the MARS program on NOM.

Eliminate Existing Credit for Adding Liquidity on Nasdaq and NOM

First, the Exchange proposes to eliminate an existing credit for securities in all three Tapes that it provides (other than Supplemental Orders or Designated Retail Orders) to members that meet a specified volume threshold on Nasdaq for displayed quotes/orders that add liquidity, and that also meet a specified volume threshold on NOM when adding liquidity. Specifically, it provides that a member will receive a credit of \$0.0030 per share executed if the member (1) adds liquidity through one or more of its Nasdaq Market Center MPIDs during the month that, in all securities, represents at least 0.12% of Consolidated Volume<sup>3</sup> during the month, and (2) adds

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<sup>3</sup> Equity 7, Section 118(a) defines "Consolidated Volume" to mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity the date of the annual reconstitution of the Russell Investments Indexes is excluded from both total Consolidated Volume and the member's trading activity.

Customer,<sup>4</sup> Professional,<sup>5</sup> Firm,<sup>6</sup> Non-NOM Market Maker,<sup>7</sup> and/or Broker-Dealer<sup>8</sup> liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of 1.15% or more of total industry ADV in the customer clearing range for Equity and ETF option contracts per day during the month on the Nasdaq Options Market.

This credit has not been effective in accomplishing its intended purpose, which is to incent members to increase their liquidity adding activity on both Nasdaq and NOM. The Exchange has observed that historically, few members have received this credit, only one member currently qualifies for it, and it has served to neither meaningfully increase activity on the Exchange or NOM nor improve the quality of those markets. The Exchange therefore proposes to eliminate it.

Amended Credit for Adding Liquidity on Nasdaq and Qualifying for MARS Tier 4

The second change will raise a qualification requirement for an existing credit in securities in all Tapes that applies to members that meet certain Consolidated Volume thresholds on Nasdaq and which qualify for a certain tier status in the NOM Market Access and Routing subsidy or “MARS” program. Under the MARS program, NOM pays a subsidy to NOM Participants that provide certain order routing functionalities to other NOM Participants and/or

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<sup>4</sup> The term “Customer” applies to any transaction that is identified by a participant for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of broker or dealer or for the account of a “Professional,” as defined in Option 7, Section 1.

<sup>5</sup> A “Professional” is defined in Options 1, Section 1(a)(47) as “any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).”

<sup>6</sup> The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at OCC.

<sup>7</sup> The term “Non-NOM Market Maker” or (“O”) is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

<sup>8</sup> The term “Broker-Dealer” or (“B”) applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

that use such functionalities themselves.<sup>9</sup> The MARS program provides different tiers of rebates or “MARS Payments” to Participants that qualify for the program. The specified MARS Payment is paid on all executed Eligible Contracts that add liquidity, which are routed to NOM through a participating NOM Participant's System and meet the requisite Eligible Contracts ADV.<sup>10</sup>

Specifically, the Exchange currently provides a \$0.0030 per share executed credit for a member with displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide more than 0.50% of Consolidated Volume on Nasdaq, if the member also qualifies for Tier 4 of NOM's MARS program during the month. To qualify for the Tier 4 MARS Payment, a Participant must have routed at least 20,000 Eligible Contracts daily in a month that are executed and that added liquidity.

The Exchange proposes to amend this credit by raising, from 0.50% to 0.65%, the threshold percentage of Consolidated Volume that must consist of liquidity provided on Nasdaq to qualify for the credit. The purpose of this change is to incentivize members that currently

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<sup>9</sup> See Securities Exchange Act Release No. 79251 (November 7, 2016), 81 FR 79536 (November 14, 2016) (SR-NASDAQ-2016-149).

<sup>10</sup> To qualify for the program, the Participant's routing system (“System”) is required to: (1) Enable the electronic routing of orders to all of the U.S. options exchanges, including NOM; (2) provide current consolidated market data from the U.S. options exchanges; and (3) be capable of interfacing with NOM's API to access current NOM match engine functionality. Further, the Participant's System must also cause NOM to be the one of the top three default destination exchanges for (a) individually executed marketable orders if NOM is at the national best bid or offer (“NBBO”), regardless of size or time or (b) orders that establish a new NBBO on NOM's Order Book, but allow any user to manually override NOM as a default destination on an order-by-order basis. Any NOM Participant would be permitted to avail itself of this arrangement, provided that its order routing functionality incorporates the features described above and satisfies NOM that it appears to be robust and reliable. The Participant remains solely responsible for implementing and operating its System. See Options 7, Section 2. To qualify for a MARS Payment tier, a NOM Participant that has System Eligibility, as described above, must have routed the requisite number of Eligible Contracts daily in a month (“Average Daily Volume”), which were executed on NOM. For the purpose of qualifying for the MARS Payment, Eligible Contracts may include Firm, Non-NOM Market Maker, Broker-Dealer, or Joint Back Office or “JBO” equity option orders that add liquidity and are electronically delivered and executed. Eligible Contracts do not include Mini Option orders. *Id.*

qualify for this credit to further increase the extent of their liquidity providing activity on Nasdaq to continue to qualify for it. Periodically, the Exchange re-calibrates the qualifying criteria for its pricing tiers to keep pace with changes in member activity and to ensure that the criteria remain appropriately challenging for members to satisfy. In this instance, the Exchange concluded that the existing criteria were ripe for upward adjustment insofar as members have satisfied them comfortably for some time.

## 2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,<sup>11</sup> in general, and further the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>12</sup> in particular, in that they provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposals are also consistent with Section 11A of the Act relating to the establishment of the national market system for securities.

### The Proposals are Reasonable

The Exchange's proposals are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4) and (5).

range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>13</sup>

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>14</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. Within the foregoing context, the proposals represent reasonable attempts by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange believes that it is reasonable to eliminate its existing \$0.0030 per share executed credit for a member that (1) adds liquidity on Nasdaq that represents at least 0.12% of

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<sup>13</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>14</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Consolidated Volume during the month; and (2) adds liquidity on NOM of 1.15% or more of total industry ADV in the customer clearing range per day during the month. As discussed above, the Exchange has observed that historically, few members have received this credit, and that only one member currently qualifies for it. The credit has served to neither meaningfully increase activity on the Exchange or NOM nor improve the quality of those markets. Under these circumstances, the Exchange believes it is reasonable to eliminate the credit and reallocate its limited resources to more effective incentive programs.

The Exchange also believes that it is reasonable to raise the qualification criteria for the \$0.0030 per share executed credit for a member that (i) provides liquidity on Nasdaq representing more than 0.50% of Consolidated Volume; and (ii) qualifies for Tier 4 of the NOM MARS program. Periodically, the Exchange re-calibrates the qualifying criteria for its pricing tiers to keep pace with changes in member activity and to ensure that the criteria remain appropriately challenging for members to satisfy. In this instance, the Exchange concluded that it would be reasonable to raise the criteria to qualify for this credit insofar as members have satisfied the volume threshold comfortably for some time. The proposed change will incentivize members that currently qualify for this credit to further increase their liquidity providing activity on Nasdaq to continue to receive it.

The Exchange notes that those market participants that are dissatisfied with the proposals are free to shift their order flow to competing venues that offer more generous pricing or less stringent qualifying criteria.

#### The Proposals are Equitable Allocations of Credits

The Exchange believes its proposals will allocate its charges and credits fairly among its market participants.

The Exchange believes that is an equitable allocation to eliminate its existing \$0.0030 per share executed credit for a member that (1) adds liquidity on Nasdaq that represents at least 0.12% of Consolidated Volume during the month; and (2) adds liquidity on NOM of 1.15% or

more of total industry ADV in the customer clearing range per day during the month. As discussed above, the Exchange has observed that historically, few members have received this credit, and only one currently does so. The credit has served to neither meaningfully increase activity on the Exchange or NOM nor improve the quality of those markets. Under these circumstances, the Exchange believes it is equitable to eliminate the credit and reallocate its limited resources to more effective incentive programs.

The Exchange also believes that it is an equitable allocation increase the volume requirements for the \$0.0030 per share executed credit for a member that (i) provides liquidity on Nasdaq representing more than 0.50% of Consolidated Volume; and (ii) qualifies for Tier 4 of the NOM MARS program. Specifically, it is equitable for the Exchange to re-calibrate the qualifying criteria for its pricing tiers, from time to time, to keep pace with changes in member activity and to ensure that the criteria remain appropriately challenging for members to satisfy. In this instance, the proposed change will incent members that currently qualify for this credit to further increase their liquidity providing activity on Nasdaq to continue to receive it. To the extent that the proposed change succeeds in further increasing liquidity on the Exchange, then the Exchange will experience improvements in its market quality, which stands to benefit all market participants.

Any participant that is dissatisfied with the proposals is free to shift their order flow to competing venues that provide more generous pricing or less stringent qualifying criteria.

#### The Proposals are not Unfairly Discriminatory

The Exchange believes that its proposals are not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its volume-based tiered pricing model is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries – from co-branded credit cards to grocery stores to cellular telephone data plans – that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of



their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

The proposal to eliminate one of the Exchange's transaction credits is not unfairly discriminatory because only one member qualifies for the credit, such that its elimination is fair and will have limited impact. The Exchange has limited resources with which to apply to incentives, and it must allocate those limited resources in a manner that prioritizes areas of greatest need and potential effect.

The Exchange believes that its proposal to raise the qualifying Consolidated Volume criteria for one of its transaction credits is not unfairly discriminatory because this credit is available to all members. Moreover, the proposal will incentivize members that currently qualify for the credit to increase the extent of their liquidity adding activity on the Exchange to continue to qualify for it. To the extent that the proposal succeeds in this objective, then the resulting increase in liquidity stands to improve the overall market quality of the Exchange, to the benefit of all market participants.

Any participant that is dissatisfied with the proposals is free to shift their order flow to competing venues that provide more generous pricing or less stringent qualifying criteria.

**B. Self-Regulatory Organization's Statement on Burden on Competition**

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

**Intramarket Competition**

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage.

The proposed elimination of one of the Exchange's existing transaction credits will have minimal competitive effect insofar as the credit is utilized currently by only one member. The Exchange notes that it offers other means to attain similar credit tiers.

Meanwhile, the proposed increase to the qualifying criteria for another one of its transaction credits will have market-improving effects, to the benefit of all members. Any member may elect to achieve the levels of liquidity required in order to qualify for the amended credit.

The Exchange notes that its members are free to trade on other venues to the extent they believe that the proposed qualification criteria for these credits are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. The Exchange notes that its pricing tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

#### Intermarket Competition

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its credits and fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited.

The proposed amended credits are reflective of this competition because, even as one of the largest U.S. equities exchanges by volume, the Exchange has less than 20% market share,

which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprises upwards of 50% of industry volume.

The Exchange's proposals are pro-competitive in that the Exchange intends for them to increase liquidity on the Exchange, thereby rendering the Exchange a more attractive and vibrant venue to market participants.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>15</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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<sup>15</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2021-020 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2021-020. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2021-020

and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>16</sup> 17 CFR 200.30-3(a)(12).